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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE, Plaintiff and Respondent, v. DAVID MORENO, Defendant and Appellant.	C085830 (Super. Ct. Nos. NCR94023, 17CR000822)

In exchange for a stipulated sentence, defendant David Moreno pleaded guilty to transporting a controlled substance for sale and admitted to violating probation. On appeal, he contends the trial court (1) violated the terms of his plea agreement by imposing a prison term instead of a jail term, (2) failed to award all custody credits to which he was entitled, and (3) imposed an unauthorized sentence by adding penalty assessments to a lab fee and a drug program fee. Part of defendant's custody credit claim has merit. But because the trial court has already corrected the award of custody credits, we will affirm the judgment.

BACKGROUND

The 2014 case, NCR94023

On September 16, 2014, defendant pleaded no contest to four counts: two counts of possessing a firearm as a felon, one count of carrying a loaded firearm, and one count of carrying a loaded firearm with intent to commit a felony (the 2014 case). The trial court suspended imposition of sentence and granted defendant three years' probation. It also ordered defendant to serve one year in jail and awarded 537 days of custody credit (269 actual; 268 conduct).

The 2017 case, 17CR000822

On March 10, 2017, defendant was pulled over while driving and found with 13.9 grams of methamphetamine, a digital scale, a pay/owe sheet, and empty bags.[1] He was held in custody for two days following his arrest. On March 30, 2017, an amended complaint was filed (the 2017 case).

On July 6, 2017, a petition to revoke defendant's probation was filed. The petition alleged that on March 10, 2017, defendant was arrested for possessing and transporting a controlled substance for sale, and on March 14, 2017, defendant was again arrested for possessing a controlled substance. The petition was later amended to allege defendant was also arrested on July 11, 2017 for possessing methamphetamine.

Starting on July 11, 2017, defendant was in custody on both the 2014 case and the 2017 case. Bail was set at $75,000 for the 2014 case, and $150,000 for the 2017 case.

By August, a resolution was reached. The trial court confirmed with defendant: "There is a stipulated agreement you would be serving two years state prison. It is two years on this case and two years on the probation violation concurrent in exchange for

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[1] Defendant stipulated to a factual basis in the police report.

less time and dismissal of everything else. [¶] Is that your understanding and agreement, [defendant]?" Defendant answered, "Yes." The court later admonished: "If you are sent to state prison, it is two years."

Defendant then pleaded guilty in the 2017 case to transporting a controlled substance for sale and admitted to violating probation in the 2014 case. The remaining counts were dismissed along with another case, 17CR1825.

After 70 days in custody, defendant was sentenced on September 18, 2017. At sentencing defense counsel recited the stipulation: "it was two years on both matters to run concurrent to each other with credit for time served." The prosecutor confirmed that was his understanding. The court then imposed two-year middle terms on each of the four 2014 counts to run concurrently. On the 2017 case, it imposed a two-year low term also to run concurrently. In doing so, the court stated without objection, "that will be two years and that will be state prison."

In the 2014 case, the court awarded 677 days of custody credits (339 actual, 338 conduct) consisting of the 537 days of credit awarded in 2014 and the 140 days of credit (70 actual, 70 conduct) accrued in 2017. In the 2017 case, it awarded four days of custody credit (2 actual, 2 conduct). It did not award the 140 days of custody credit accrued in 2017.

After this appeal was filed, defendant sent a *Fares*[2] letter to the trial court requesting restoration of his custody credits. The trial court issued an amended abstract of judgment awarding an additional 140 days of custody credit (70 actual, 70 conduct) towards defendant's 2017 case.

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2 *People v. Fares* (1993) 16 Cal.App.4th 954.

I

Terms of the Plea Agreement

On appeal, defendant first contends the trial court violated the terms of the plea agreement by imposing a prison term instead of a jail term. In support, he points to the plea form where next to the specified two-year term, the box for "County Jail" is checked. We conclude there was no violation of the plea agreement.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles." (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) " 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.' " (*Ibid*.)

Here, the record does not indicate a jail term was part of the plea agreement. Numerous times, the trial court stated the plea agreement included serving two years in state prison. No party corrected the court. And after a prison term was imposed, no party objected.

The plea form does not establish otherwise. The box immediately to the left of the words "County Jail" is checked. But immediately to the left of that checked box are the words, "State prison (or the Division of Juvenile Justice)." The box is in the middle. Given the totally of the circumstances and the absence of anything else to suggest a jail term was part of the plea agreement, in all likelihood the wrong box on the plea form was inadvertently checked.

II

Award of Presentence Custody Credits

Defendant next challenges the amount of custody credits awarded. He first contends the trial court erred in failing to award the 140 days of credit (70 actual, 70 conduct) to his 2017 case because that time was attributable to both his 2014 and his 2017 cases. He next contends the trial court erred in failing to award the 537 custody credits accrued in his 2014 case to his 2017 case. Only his first contention has merit, but the trial court has already awarded those credits. Thus, we can affirm the judgment.

A.

Awarding 140 Days' Custody Credits to the 2017 Case

Where a defendant's custody is solely presentence on all charges and he or she is simultaneously sentenced on all charges to concurrent terms, presentence custody credits are applied to all charges. (*People v. Kunath* (2012) 203 Cal.App.4th 906, 911.) Accordingly, here, because concurrent terms were imposed and the custody credit is presentence, the 140 days of presentence credit, which is attributable to both the 2014 and 2017 cases, must be applied to both cases.

The People nevertheless maintain defendant has failed to establish entitlement to that credit by showing he could have been at liberty during his presentence custody but for the same conduct that led to the instant conviction and sentence. The People reason defendant had another case pending, 17CR1825 that was dismissed at the plea hearing, and accordingly defendant has not shown all his time in custody was solely attributable to the conduct underlying the 2014 and 2017 cases. We are not persuaded.

Nothing indicates the dismissed case, 17CR1825, rendered defendant ineligible for custody credits on his 2017 case. Indeed, it did not render him ineligible for those credits in the 2014 case. Bail was set in both the 2014 and 2017 cases when the credits accrued.

And nothing indicates the award of credits to the concurrent terms would create a windfall. (Cf. *In re Marquez* (2003) 30 Cal.4th 14, 23 [the requirement to establish strict causation the custody was a "but for" cause of the case, applies only where there is a possibility of duplicate credit that might create a windfall].)

In sum, the 140 days of credit should have been applied to both the 2014 and the 2017 cases. As previously noted, the trial court has already amended the abstract of judgment to award those credits to the 2017 case.

B.

Awarding 537 Days' Custody Credits Accrued in Defendant's 2014 Case to his 2017 Case

Defendant next points to the 537 days of custody credits accrued prior to being granted probation in his 2014 case and contends those credits should also be applied to his 2017 case. He reasons Penal Code section 2900.5's[3] purpose is to equalize the total time in custody as between a person who obtains presentence release and one who is confined awaiting sentence. And had he obtained presentence release in both cases, he would serve no more than two years. But because he did not, he will ultimately serve more than two years. He maintains section 2900's purpose is accomplished only if the 537 days are also credited to his 2017 case.

Defendant also raises this contention as an Equal Protection claim. He asserts there are two distinct classes: defendants who obtain pretrial release through bail and those who do not. He maintains no rational basis exists for requiring a defendant who does not obtain pretrial release to serve increased punishment compared to a defendant who posts bail. As to both claims, defendant is mistaken.

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3 Undesignated statutory references are to the Penal Code

By statute, credit is awarded only for custody attributable to the same conduct for which a defendant has been convicted. (§ 2900.5, subd. (b).) And defendant's 537 days of credits are not attributable to his 2017 case. Accordingly, they may not be applied to his 2017 case —which arose long after the credits accrued. (See *In re Rojas* (1979) 23 Cal.3d 152, 155 ["credit is to be given 'only where' custody is related to the "same conduct for which the defendant has been convicted"]; *People v. Jacobs* (2013) 220 Cal.App.4th 67, 84 [where concurrent terms were imposed, defendant was not entitled to presentence credit for custody not attributable to his instant case].)[4]

Defendant's Equal Protection claim also fails. Defendant's sentence was imposed in accordance with the plea agreement. Whether he would have received the same plea deal had he obtained presentence release, or if more custody credit were available to reduce his term, is entirely speculative. (See *People v. Brown* (2012) 54 Cal.4th 314, 328 [an Equal Protection claim must show a state adopted classification that affects similarly situated groups in an unequal manner — the groups must be similarly situated for purposes of the law challenged].)

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4 Defendant argues *People v. Jacobs, supra*, 220 Cal.App.4th 67 was wrongly decided in that it construed *Kunath, supra,* 203 Cal.App.4th 906 as not authorizing credit for custody not attributable to the same case. Defendant maintains credits are authorized because he was sentenced on both cases at the same time, and thus the credit is "attributable to the proceedings" under section 2900.5. We cannot agree. Simply because the 2017 and 2014 cases were sentenced together does not entitle defendant to dual credit. (See *People v. Brown* (1984) 156 Cal.App.3d 1131, 1135 [presentence custody served before the current crime was committed was not related to the current crime even though the prior crime was used to aggravate the current crime].) Defendant offers nothing directly rebutting that conclusion beyond an overly broad reading of section 2900.5.

Further, defendant's attempt to apply credits from 2014 to a term for an unrelated 2017 crime is analogous to a defendant who accrues presentence credits in excess of the term imposed at sentencing.[5] In that case, the defendant may not save those unused credits for a future sentence imposed for a future crime. (See *People v. Wiley* (1994) 25 Cal.App.4th 159, 166 [that the defendant accumulated excess custody credits is not a reason to permit him to benefit from those credits in a separate case]; see also *In re Marquez, supra,* 30 Cal.4th at p. 20 [sometimes "dead time," time spent in custody for which a defendant receives no benefit, is unavoidable].) And even though excess credits can result in a disparity between a defendant who obtains presentence release and one who does not, there exists an important correctional purpose in not allowing excess credits to become a "Get Out of Jail Free" card.[6]

Defendant may not apply the 537 days of custody credits accrued in his 2014 case to his 2017 case.

III

Imposition of Penalty Assessments

Defendant contends the trial court erred in adding penalty assessments to a lab fee (Health & Saf. Code, § 11372.5) and a drug program fee (Health & Saf. Code, § 11372.7) imposed at sentencing. In short, defendant argues the lab and drug program fees are

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[5] Indeed, had defendant not committed his new crime in 2017 and instead completed probation, he would be left with excess credit from which he would receive no sentence reduction benefit. To allow him to derive benefit from those excess credits (and other credits from 2014) by virtue of his committing a new crime in 2017 defies logic.

[6] Section 2900.5, does provide a mechanism for excess credits to be applied toward fines. (§ 2900.5, subd. (a).)

"administrative fees" that are not subject to penalty assessments, rather than "fines" that are subject to the assessment.

This issue has been resolved by our Supreme Court. Both the lab and drug program fees are "fines" subject to penalty assessments. (See *People v. Ruiz* (2018) 4 Cal.5th 1100, 1103.) Accordingly, the trial court did not err in adding penalty assessments to the lab fee and the drug program fee.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
RAYE, P. J.

/s/
DUARTE, J.